

NEW JERSEY PRESS ASSOCIATION POSITION STATEMENT ON EXECUTIVE ORDER 21

On July 5, 2002, Governor James E. McGreevey signed Executive Order No. 21. That executive order directs that all levels of government - state, county, municipal and school district - restrict access to certain classes of records that would otherwise constitute accessible government records under the new Open Public Records Act which became effective on July 8, 2002.

The power to issue such an executive order derives from both the constitution of the state of New Jersey and the provisions of the Open Public Records Act, which authorizes that exemptions may be created, inter alia, by resolution of either or both houses of the legislature, regulation promulgated under the authority of any statute, executive order of the governor or rules of court. This authority to exempt records from access by these various means in the new Open Public Records Act is a continuation of the same authority to exempt found in the prior Right-To-Know Law. Under that prior law, however, the prevailing judicial view was that such authority should be exercised sparingly and only to the extent required by the public interest.

Executive Order 21 effects the following:.

First, the Executive Order directs all levels of government that where the inspection, examination or copying of any government record would substantially interfere with the state's ability to protect and defend the state and its citizens against acts of sabotage or terrorism, or where, if records are disclosed it would materially increase the risk or consequences of potential acts of sabotage or terrorism, access shall be denied. The executive order further directs the Attorney General to promulgate a regulation to govern the determination of which government records shall be deemed to be confidential pursuant to this mandate; but in the meantime, until such promulgation, it directs all public agencies to handle all government record requests in a manner consistent with this vague standard as worded in the executive order.

NJPA is concerned with the vague and broadly worded standard of the order and how that standard will be implemented, both in the regulation to come and by the numerous public agencies directed to apply this standard pending promulgation of a more specific list by the Attorney General. For example, will public agencies apply the standard uniformly? Will the standard be applied on a categorical basis (certain classes of records will simply not be made available) or will it be applied on a case-by-case basis? If applied on a case-by-case basis, this would seem to alter fundamentally the traditional nature by which access to a statutory public record has been permitted. Traditionally, if a record is a statutory public record and not otherwise exempt from access, the requestor had only to establish that the requestor is a New Jersey citizen. The requestor has not been required to explain his/her/its interest in the record or why access is sought. If, however, the standard is to be applied on a case-by-case basis, it would appear that there must now be some interrogation of the requestor by the custodian as to the requestor's interest in and proposed use of, the record. A significant new condition to access!

Second, the executive order designates certain records in the office of the governor as exempt from the provisions of the Open Public Records Act including records that, prior to the effective date of the new law have been found by a court to be confidential, or have been found not to be public records. This latter category - found not to be a public record - is troubling because its interpretation is unclear. If a record was found not to be a public record under the prior Right-to-Know Law, which had a much more narrow definition than the current law of what constitutes a government or public record, is it the intention of this executive order to, in effect, apply the older definition to such records? This, of course, would work a rewording of the newly effective OPRA and fly in the face of our state legislative process. And what meaning is to be applied to a prior finding by a court that a record was not subject to access? Is it intended that just that individual record is to be deemed not subject to access under the executive order? Or is it that all similar types of records are to be deemed not subject to access under the order? And, of the latter, where are the guidelines to determine what constitutes similarity?

The executive order also exempts from public access all records or portions of records of the governor's office, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege. While the new law exempts information containing advisory, consultative and deliberative material or protected by a recognized privilege, the new law also requires that where a record contains such information as well as information that is not exempt, the custodian is required to redact the exempt information and give the balance of the document to the requestor. It is not clear from the

language of this executive order whether the intention is to remove the requirement for redaction and to exempt from access all aspects of a record held by the governor's office even if only a portion contains advisory, consultative or deliberative information or privileged information.

Finally, in the context of the office of the governor, the executive order exempts records containing information provided by a person outside the office of governor who has or would have had reasonable expectation of privacy in that information when it was provided to the office of governor. This would appear to mirror the exemption the legislature granted to itself for constituent communication, although it is somewhat more limited in scope (by restricting its application to that information where the person would have a reasonable expectation of privacy). However, it is the custodian who will apparently make that determination of expectation of privacy and that expectation of privacy is not necessarily limited to truly personal communications from a natural person to the office of governor. Again, there are no guidelines to assist the custodian, thus granting the custodian a frightfully unguarded authority to exempt.

Third, a significant number of administrative agencies on July 1, 2002 proposed various regulations exempting certain of their records from access pursuant to the law and establishing procedures to be followed by requestors seeking access to records. Under the provisions of the Administrative Procedures Act, which governs the passage of regulations by state agencies, those regulations were duly published in the New Jersey Register and a public comment period established in each instance up through August 30th.

The executive order, however, recites the existence of those regulatory proposals but nevertheless directs effective implementation of those proposals. Each state agency is directed to handle all government record requests in a manner consistent with the rules as they have been proposed and published — now without waiting for public hearings on them and subsequent passage as the APA directs.

Although NJPA's review of the numerous proposed rules is not yet complete, those rules that have been reviewed in many instances both seek to exempt records from access and further set new procedural rules for accessing records (from an agency by a requestor). NJPA is concerned about the effective implementation of these regulations in advance of the public comment period inasmuch as a preliminary review reveals that at least some of the exemptions may be overbroad and some of the procedural rules dealing with requests for public

records may be inconsistent with the provisions of the Open Public Records Act and have the effect of creating new impediments to access. As an example, several of the rules require prepayment of costs where a copy of a document is sought while the Open Public Records Act would seem to contemplate prepayment only in the context of anonymous requests for records.

NJPA has requested a meeting with the governor and his senior staff to discuss this executive order, its implications and NJPA's objections and concerns in connection therewith.